No. 14-1504

In The Supreme Court of the United States

ROBERT J. WITTMAN, *et al.*,

Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

SUPPLEMENTAL BRIEF OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES

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SUPPLEMENTAL QUESTION PRESENTED

On September 28, 2015, the Court ordered the parties to file supplemental briefs addressing the following question:

> Whether appellants have standing under Article III of the United States Constitution.

TABLE OF CONTENTS

	Page
SUPPLEMENTAL QUESTION PRESENTED....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
GLOSSARY	iv
INTRODUCTION	1
ARGUMENT	4
One or more of the Congressmen might have appellate standing, but they have not yet alleged an injury in fact	4
CONCLUSION.....	10

TABLE OF AUTHORITIES

Page

CASES

Ala. Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 6

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 5, 6

Bond v. United States,
131 S. Ct. 2355 (2011) 7, 8

Diamond v. Charles,
476 U.S. 54 (1986) 7

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 5, 6, 7, 10

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 6

Powers v. Ohio,
499 U.S. 400 (1991) 7

Sinkfield v. Kelley,
531 U.S. 28 (2000) 5

Spencer v. Kemna,
523 U.S. 1 (1998) 8

United States v. Hays,
515 U.S. 737 (1995) 4, 5, 7

United States v. Windsor,
133 S. Ct. 2675 (2013) 4

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III 5, 7, 10

U.S. Const. amend. XIV 5

GLOSSARY

BVAP	Black Voting-Age Population
CD#	Virginia Congressional District No.
The Congressmen	Appellants Robert J. Wittman, Bob Goodlatte, J. Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf
JS	Jurisdictional Statement
PX	Plaintiffs' Trial Exhibit No.

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INTRODUCTION

Several events have occurred since briefs were last filed.

On August 5, 2015, the district court denied the motion of the Virginia House of Delegates and the Virginia Senate to postpone the deadline for the Virginia General Assembly to draw new congressional districts.[1] Those houses, neither of which intervened

[1] Order, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678 (E.D. Va. Aug. 5, 2015), ECF No. 201.

as a party, had sought to postpone the remedial deadline from September 1 until November 16, 2015.[2] The State Board of Elections opposed that extension because, among other reasons, the Governor had called a special session for August 17, 2015, and the proposed mid-November deadline would restrict the time needed for a judicial remedy, if the legislative effort failed, unduly compressing the 2016 election cycle.[3] In denying the motion, the district court ruled that the two houses had failed to show that the Congressmen were likely to succeed on their appeal here or that the houses would suffer irreparable injury by adhering to the September 1 deadline. Judge Payne dissented and would have granted the extension.

The General Assembly convened on August 17, 2015 to address congressional redistricting, but the Senate adjourned sine die, without agreement on a plan.

On September 3, after the legislature's deadline had passed, the court announced that it would appoint a special master to assist the court in redrawing the lines, and the court directed the parties to suggest

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[2] Mem. in Supp. of Interested Parties' Va. House of Delegates' and Va. Senate's Mot. for an Extension of Time to Comply with this Court's June 5, 2015 Order, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678 (July 15, 2015), ECF No. 193.

[3] Defs.' Br. in Opp'n to Va. House of Delegates' and Va. Senate's Mot. for an Extension of Time to Comply with this Court's June 5, 2015 Order, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678 (July 29, 2015), ECF No. 199.

candidates.[4] The court also imposed deadlines of September 18—for the parties, as well as any interested non-parties, to submit proposed redistricting plans—and October 2 (later extended until October 7), for comments on such plans.

On September 18, the Governor, a State Senator, the Congressmen, and the plaintiffs each submitted proposed redistricting plans. Proposed remedial plans also were submitted by various non-parties.[5]

On September 25, after the parties agreed on two candidates,[6] the court appointed Dr. Bernard Grofman as special master.[7] The appointment order directed Dr. Grofman to review the various submissions and to "recommend to the Court a proposed plan, a modified version of a proposed plan, or a plan devised by the Special Master, that remedies the deficiencies identified in the Court's June 5, 2015 opinion."[8] The court directed the special master to submit his report and recommendation by October 30, 2015. The court also

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[4] Order, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 3, 2015), ECF No. 207.

[5] The Virginia Division of Legislative Services has posted the submissions at http://redistricting.dls.virginia.gov/2010/court-ordered-redistricting.aspx.

[6] Second Agreed Submission Regarding Proposed Candidates for Special Master, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 18, 2015), ECF No. 224.

[7] Order, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 25, 2015), ECF No. 241.

[8] *Id.* ¶ 1.

set a briefing schedule for comments by parties and by non-parties to enable the court to "adopt a redistricting plan at the earliest practical opportunity after November 17, 2015."[9]

ARGUMENT

One or more of the Congressmen might have appellate standing, but they have not yet alleged an injury in fact.

"There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution."[10] The plaintiffs are voters in Virginia's Third Congressional District and claimed injury as a result of the General Assembly's alleged use of race as the predominant factor in drawing CD3. Accordingly, the plaintiffs stated a valid Equal Protection claim. As this Court held in *United States v. Hays*, "[w]here a plaintiff resides in a racially gerrymandered district . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action."[11]

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[9] *Id.* ¶ 2.

[10] *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013).

[11] 515 U.S. 737, 744-45 (1995).

But *Hays* also established that voters in districts that *adjoin* a racially gerrymandered district normally lack standing to complain, even though the shapes of their districts "were necessarily influenced by the shapes of the majority-minority districts upon which they border."[12] "[A]bsent specific evidence" that the adjoining-district plaintiff "has personally been subjected to a racial classification," that "plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve."[13] So despite that the racial composition in the adjoining district "would have been different," but for the racially gerrymandered district, "an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment."[14]

Article III's standing requirement must be met "'by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'"[15] "To have standing, [the appellant] must seek relief for an injury that affects him in a 'personal

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[12] *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam) (discussing *Hays*).

[13] *Hays*, 515 U.S. at 745.

[14] *Id.* at 746.

[15] *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

and individual way.'"[16] The appellant "must possess a 'direct stake in the outcome' of the case."[17]

Since none of the Congressmen—appellants here—lives in CD3, none would have had standing in the district court to complain about that district's composition, even though the composition of CD3 necessarily affected the composition of one or more of the adjoining districts. But the question of appellate standing differs from the plaintiffs' standing in the district court.

As explained in our motion to affirm, the Commonwealth did not appeal the district court's judgment invalidating Virginia's 2012 congressional redistricting plan. In our view, in light of *Alabama Legislative Black Caucus v. Alabama*,[18] the district court's finding that CD3 was racially gerrymandered was supported by substantial evidence that the legislature impermissibly used a 55% BVAP floor, a finding that cannot be considered "clearly erroneous" under the applicable standard of appellate review.[19]

When, as in this case, the State has chosen not to appeal, the Congressmen, as appellants, must

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[16] *Id.* at 2662 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

[17] *Id.* (quoting *Arizonans for Official English*, 520 U.S. at 64).

[18] 135 S. Ct. 1257 (2015).

[19] *See* Mot. to Affirm by Va. State Bd. of Elections Appellees at 2-3, 23-29 (July 22, 2015).

demonstrate standing in their own right.[20] They "'must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.'"[21]

It might be tempting to suppose that, since the Congressmen do not live in CD3, they have not suffered an injury in fact for a racial gerrymandering claim under *Hays*. But that would conflate what is needed to establish standing to assert a racial gerrymandering claim with what an appellant must show to have standing to challenge a judgment on appeal. *Bond v. United States* teaches that, once an appellant satisfies the injury-causation-and-redressability requirements to establish standing, Article III does not restrict the legal grounds that may be asserted to win relief.[22] Thus, in *Bond*, this Court held that the appellant had standing to challenge the statute under which she was convicted on the ground that it unconstitutionally abridged the powers of the States, even though no State was a party to the proceeding. "Bond's challenge to her conviction and sentence 'satisfie[d] the case-or-controversy requirement, because

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[20] *Hollingsworth*, 133 S. Ct. at 2662-63; *Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.").

[21] *Hollingsworth*, 133 S. Ct. at 2663 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

[22] 131 S. Ct. 2355, 2361-62 (2011).

the incarceration . . . constitute[d] a concrete injury, caused by the conviction and redressable by invalidation of the conviction.'"[23]

In this case, the Congressmen base their appellate standing on the ground that remedying CD3 will necessarily alter one or more of the appellants' adjoining districts—CD1 (Robert J. Wittman); CD2 (Scott Rigell); CD4 (J. Randy Forbes); and CD7 (David Brat). As they put it:

> Any remedy must therefore move such voters *out* of District 3 and into one or more of the surrounding Republican districts, and an equal number of (white) voters into District 3. Thus, any remedy approved by the . . . court, will necessarily alter districts where Appellants have previously been elected.
>
> Such changes will be particularly injurious because they will undo an Appellant's recommendations for his district, replace a portion of "his base electorate" with unfavorable Democratic voters, and harm Appellants as Republican voters.[24]

While the Congressmen *might* be able to allege facts sufficient to demonstrate appellate standing, their allegations to date are inadequate. It is still unknown what remedial plan the district court will

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[23] *Id.* at 2362 (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

[24] Br. Opposing Appellees' Mots. to Dismiss or Affirm at 12 (Aug. 4, 2015).

implement; the special master has until October 30 to propose one.

Notably, the two remedial plans proposed by the Congressmen make relatively small changes to CD3 and the adjoining districts. The Congressmen themselves tout their proposed changes as "narrowly drawn to fix the defect in Enacted District 3 identified by the Court and to give effect, to the greatest extent practicable, to the Legislature's overarching priorities of incumbency protection and preservation of cores to maintain the 8-3 partisan division established in the 2010 election."[25] Although the district court rejected the Congressmen's claim that the purpose of the 2012 plan was to entrench an 8-3 Republican-Democrat split in Virginia's congressional delegation,[26] the point here is simply that the Congressmen in the districts adjoining CD3 have not yet identified any concrete injury that *they* would suffer if the court accepts their remedial plan.

The Congressmen's claim that *any* remedial plan would differ from the one they expected likewise fails to establish a concrete injury. That claim is also foreclosed by their interrogatory answers, which

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[25] Intervenor-Defs.' Br. in Supp. of Their Proposed Remedial Plans at 2, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 18, 2015), ECF No. 232.

[26] *See* JS 16a n.12 (majority ruling rejecting 8-3-split theory); Mot. to Affirm by Va. State Bd. of Elections Appellees at 30-35.

asserted that they had no input into the enacted plan and no knowledge about how it was formulated.[27]

CONCLUSION

Although Appellants ultimately may be able to demonstrate appellate standing, they have not yet articulated an injury in fact sufficient to satisfy Article III.

Respectfully submitted,

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[27] PX 34 at 1-2 (answer of Rep. Forbes—CD4—that he provided no feedback on the enacted redistricting plan); PX 38 at 1-2 (answer of Rep. Rigell—CD2—identifying no substantive input for the enacted plan); PX 39 at 1-2 (answer of Rep. Wittman—CD1—same). As for CD7, previously held by Representative Cantor, Representative Brat was elected in 2014, after the 2012 plan was adopted. *See also* Mot. to Affirm by Va. State Bd. of Elections Appellees at 31-32 & nn.151-53. Once Cantor lost his office, he "lost standing." *Hollingsworth*, 133 S. Ct. at 2665.